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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
4/27/2020
DEANA WILLIAMSON, CLERK

TERRI REGINA LANG, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from County

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

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ORAL ARGUMENT REQUESTED

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Terri Regina Lang.

*The case was tried before the Honorable Evan Stubbs, 424th Judicial District, Burnet County, Texas.

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No. PD-1124-19

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

TERRI REGINA LANG, Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Theft is always a lesser-included offense of organized retail theft because organized retail theft always functionally includes the statutory elements of theft.

STATEMENT OF THE CASE

This Court reversed appellant's organized retail theft conviction and remanded for consideration of reformation to the theft she conceded was proven at trial.[1] The court of appeals acquitted her, holding that theft was not a lesser-included offense because the indictment did not allege the owner of the stolen retail merchandise.[2]

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[1] *Lang v. State*, 561 S.W.3d 174, 184 (Tex. Crim. App. 2018) (*Lang II*).

[2] *Lang v. State*, 586 S.W.3d 125, 135-36 (Tex. App.—Austin 2019, pet. granted) (*Lang III*).

STATEMENT REGARDING ORAL ARGUMENT

The Court granted the State's request for oral argument.

ISSUE PRESENTED

Is reformation unauthorized unless the State pled all the elements and statutorily required notice allegations of the lesser-included offense?

STATEMENT OF FACTS

Appellant indictment for organized retail theft (ORT) alleged she:

> did then and there intentionally conduct and promote and facilitate an activity in which the defendant received and possessed and concealed and stored stolen retail merchandise, to wit: groceries, herbal supplements, energy drinks and animal treats, and the total value of the merchandise involved in the activity was greater than $500 but less than $1500.[3]

The trial was short; the State presented evidence through one witness that appellant tried to leave HEB without paying for a bag of merchandise worth over $500.[4]

After the parties rested and closed, appellant moved for a directed verdict because there was no evidence she did what, in her view, the offense contemplated, *i.e.*, participate "with a group of people or in a theft ring."[5] She concluded:

> If my motion is defeated, then simply stealing anything from a retail store, shoplifting, is always organized retail theft. It is always going to be construed as a felony, at which point there is no point in having the

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[3] 1 CR 4.

[4] 3 RR 17, 22; 4 RR 7; 6 RR State's Ex. 1 ("receipt" of items not paid for).

[5] 4 RR 37-40.

> regular 31.03 theft statute for shoplifting on the books. These elements I believe must be separated, otherwise the statute is of no effect.[6]

The trial court saw the logic in her argument but denied the motion.[7] Appellant also requested an instruction on theft, which she considered to be "the only logical conclusion" based on her motion for directed verdict.[8] This request was also denied.[9]

Appellant was convicted as charged.[10] On appeal, appellant continued her argument about the statute, which the court of appeals rejected.[11] This Court reversed, with instructions for the court of appeals to consider reformation to theft.[12] On remand, the court of appeals held that theft was not a lesser-included offense of ORT in this case because the indictment did not name the owner of the stolen merchandise.[13]

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[6] 4 RR 40.

[7] 4 RR 45-47.

[8] 4 RR 54, 57-58.

[9] 4 RR 58.

[10] 1 CR 40.

[11] *Lang v. State*, No. 03-15-00332-CR, 2017 WL 1833477, at *7 (Tex. App.—Austin May 5, 2017), *rev'd and remanded*, 561 S.W.3d 174 (Tex. Crim. App. 2018) (*Lang I*).

[12] *Lang II*, 561 S.W.3d at 183-84.

[13] *Lang III*, 586 S.W.3d at 135.

SUMMARY OF THE ARGUMENT

Theft is a lesser-included offense of organized retail theft because, under the cognate pleadings approach, theft's statutory elements can always be deduced from the elements of ORT. That is all that the *Hall* test requires. None of the other information the absence of which could give rise to a valid motion to quash a theft charge—owner's name, description of property—affects this legal truism. A different conclusion would not only break with numerous areas of established jurisprudence, it would open the door to a world where defendants can force the State to allege additional facts solely for the purpose of authorizing instructions on potential lesser offenses.

ARGUMENT

I. The "T" is for "theft."

Although the title of an offense is not binding,[14] it should come as no surprise that every allegation of ORT necessarily alleges a theft. If this Court meant what it said in all of its lesser-included cases since *Hall*, that conclusion should end the analysis.

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[14] *Baumgart v. State*, 512 S.W.3d 335, 339 (Tex. Crim. App. 2017) ("Although relevant as an extratextual factor in construing the text of a statute when consideration of such factors are allowed, '[t]he heading of a title, subtitle, chapter, subchapter, or section does not limit or expand the meaning of a statute.'") (quoting TEX. GOV'T CODE § 311.024).

I.A. The *Hall* test focuses on the Penal Code elements of the potential lesser offense.

The test for determining whether a defendant is entitled to a lesser-included-offense instruction has two parts. The first step, relevant here, employs the so-called "cognate pleadings" approach. It compares the statutory elements of the alleged offense as modified by the factual averments in the charging instrument to the elements of the requested offense.[15] If the elements of the requested offense are "'established by proof of the same or less than all the facts required to establish the commission of the offense charged,'" it is "included" and an instruction is required.[16] In *Safian v. State*, a unanimous Court described how flexible this approach is:

> [T]he elements of the lesser-included offense do not have to be pleaded in the indictment if they can be deduced from facts alleged in the indictment. When there are allegations in the indictment that are not identical to the elements of the lesser offense, a court should apply the functional-equivalence test to determine whether elements of the lesser offense are functionally the same or less than those required to prove the charged offense. An element of the lesser-included offense is functionally equivalent to an allegation in the charged greater offense if the statutory elements of the lesser offense can be deduced from the elements and descriptive averments in the indictment for the charged greater offense.[17]

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[15] *Hall v. State*, 225 S.W.3d 524, 535-36 (Tex. Crim. App. 2007).

[16] *Id*. at 536 (quoting TEX. CODE CRIM. PROC. art. 37.09(1)). Although stated in terms of subsection (1) due to the review of precedent undertaken in *Hall*, it applies to all manner of lesser-include offenses under Article 37.09. Unless otherwise stated, references to "articles" and "sections" are to the Code of Criminal Procedure and Penal Code, respectively.

[17] 543 S.W.3d 216, 220 (Tex. Crim. App. 2018) (quotations omitted) (alterations in *Safian*).

This approach "allows a defendant a broader ability to obtain the submission of a lesser-included offense than if he were limited to the statutory elements of the charged offense[,]"[18] but only because liberally construed pleadings are more likely to include the statutory elements of the desired lesser offense. "The cognate-pleadings test allows a court to look to non-statutory elements only for the charged offense; lesser offenses are examined only for their statutory elements."[19] These "statutory elements" are the elements of the offense as defined by the Legislature in the Penal Code.[20]

Under *Hall* and progeny, the question should be whether the statutory elements of theft can be deduced from the ORT alleged in the indictment.

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[18] *Fraser v. State*, 583 S.W.3d 564, 568 (Tex. Crim. App. 2019), reh'g denied (Oct. 30, 2019).

[19] *Id*.

[20] *See*, *e.g.*, *Safian*, 543 S.W.3d at 221 (comparing the allegations to the elements of deadly conduct set out in Section 22.05(a)); *Ex parte Castillo*, 469 S.W.3d 165, 171 (Tex. Crim. App. 2015) (comparing capital murder pleadings to the elements of aggravated assault in Sections 22.01(a)(1) and 22.02(a)(1)); *State v. Meru*, 414 S.W.3d 159, 163 (Tex. Crim. App. 2013) (comparing the burglary allegations to the elements of criminal trespass in Section 30.05). *Cf*. TEX. PENAL CODE § 1.07(a)(22) ("'Element of offense' means: (A) the forbidden conduct; (B) the required culpability; © any required result; and (D) the negation of any exception to the offense.").

I.B. ORT includes everything it needs to include theft.

I.B.1. ORT includes the elements of theft set out in Section 31.03.

The elements of theft are simple: "A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property."[21] Its terms are defined in Section 31.01. As the court of appeals held, consideration of the definitions of relevant terms, holdings from this Court, and common sense support the conclusion that appellant's indictment—indeed, any ORT allegation—necessarily includes the unlawful appropriation of another's property with the intent to deprive the owner of that property.[22] That should have resolved Step 1 of the *Hall* test in the State's favor.

I.B.2. Identity of the property owner is not an element.

But the court of appeals did not go to Step 2. Notwithstanding its conclusion that ORT always includes the statutory elements of theft, the court of appeals refused to reform the conviction because "[n]othing in the indictment in this case is

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[21] TEX. PENAL CODE § 31.03(a).

[22] *Lang III*, 586 S.W.3d at 132-34. *See* TEX. PENAL CODE § 31.01(4)(B) ("'Appropriate' means . . . to acquire or otherwise exercise control over property other than real property."), (2)(A) ("'Deprive' means . . . to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner[.]"), (7) ("'Steal' means to acquire property or service by theft."). The court of appeals came to same conclusion in its original opinion. *Lang I*, 2017 WL 1833477, at *7 ("Appellant's commission of theft is covered by the statute. . . . Applying the principles of statutory construction to section 31.16(b), we conclude that the statutory language permits only one reasonable understanding concerning . . . whether the offense criminalizes the underlying act of theft—it does.").

functionally equivalent to the theft element of identify of the property owner."[23] The problem is identity is not an element of theft.

In fairness, theft can get complicated. The gravamen of theft is the owner and the property stolen.[24] That means that, when pled, "the State is required to prove, beyond a reasonable doubt, that the person (or entity) alleged in the indictment as the owner is the same person (or entity) . . . as shown by the evidence."[25] And the Code of Criminal Procedure instructs prosecutors how to allege ownership.[26] But none of this makes the owner's identity an element.[27] Only the Penal Code can do that, and "[n]owhere in the penal code is the name of the owner made a substantive element of theft."[28]

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[23] *Lang III*, 586 S.W.3d at 135.

[24] *Johnson v. State*, 364 S.W.3d 292, 297 (Tex. Crim. App. 2012) ("Theft has two gravamina: the property and ownership."); *Byrd v. State*, 336 S.W.3d 242, 250-51 (Tex. Crim. App. 2011).

[25] *Byrd*, 336 S.W.3d at 252 (emphasis in original).

[26] TEX. CODE CRIM. PROC. art. 21.08 ("Where one person owns the property, and another person has the possession of the same, the ownership thereof may be alleged to be in either. Where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them. When the property belongs to the estate of a deceased person, the ownership may be alleged to be in the executor, administrator or heirs of such deceased person, or in any one of such heirs. Where the ownership of the property is unknown to the grand jury, it shall be sufficient to allege that fact."). The Code of Criminal Procedure also prescribes how property is to be described, which includes ownership. TEX. CODE CRIM. PROC. art. 21.09.

[27] *Byrd*, 336 S.W.3d at 252 ("[T]he *name* of the owner is not a substantive element of theft.") (emphasis in original).

[28] *Id*. at 251.

Unfortunately, concrete statements like that are accompanied by footnotes like this: "Thus, a theft indictment or information must both name the owner and describe the property as both elements constitute the gravamen of the offense."[29] This enabled the court of appeals said, in successive sentences, "The formal name of the person or entity owning the property is not a substantive element of theft. However, the existence of the property owner is an element of theft that must be proven by the State."[30] Whether the terms "substantive element" and "element" used by this Court in *Byrd* and by the court of appeals were intended to be distinct—the former for pleading and the other for proof, perhaps—is unclear. That's a problem. What is clear is that, although "owner" is mentioned Section 31.03(a), the owner's name is not listed in Section 31.03 or in any of the definitions of the terms in that statute. That means it cannot possibly be required as an element of theft under *Hall*'s first step.

I.C. This is consistent with the practice for "subsumed" lessers.

Concluding that *Hall* does not consider the absence of an owner-identity allegation is consistent with this Court's cases on subsumed lessers, which hold that offenses that are included within other offenses are lesser-included offenses.

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[29] *Id*. at 251 n.48.

[30] *Lang III*, 586 S.W.3d at 134 (citing *Byrd* for both).

There are many offenses that plainly include another offense by name. Continuous sexual abuse,[31] engaging in organized criminal activity,[32] and one method of capital murder[33] are defined by an act, intent, or other qualifier attached to a predicate statutory offense. Felony murder is similar but extremely broad, requiring only that the predicate felony not be manslaughter.[34] Burglary is somewhere in between, listing as predicate offenses the commission or attempt "to commit a felony, theft, or an assault."[35] What these offense have in common is that the State does not have to plead the elements of these predicate offenses for them to be lesser-included offenses.

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[31] TEX. PENAL CODE § 21.02(b)(1), (c)(1)-(8) ("during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse" defined by violation of specific penal laws).

[32] TEX. PENAL CODE § 71.02(a) (defined as "[C]ommit[ting] or conspir[ing] to commit one or more of" a laundry list of predicate offenses "with the intent to establish, maintain, or participate in a combination or in the profits of a combination or as a member of a criminal street gang.").

[33] TEX. PENAL CODE § 19.03(a)(2) (an intentional murder committed "in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or [certain types of] terroristic threat").

[34] TEX. PENAL CODE § 19.02(b)(3) ("A person commits an offense if he . . . commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual."). This Court has interpreted this to preclude lesser-included offenses of manslaughter. *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999).

[35] TEX. PENAL CODE § 30.02(a)(1), (3).

Moreover, the State cannot be forced to plead them, either.[36] This Court has upheld the denials of motions to quash for failure to allege the constituent elements of offenses subsumed by capital murder[37] and, especially relevant to this case, thefts subsumed by robbery[38] and burglary.[39] Courts of appeals have done the same with felony murder[40] and engaging in organized criminal activity.[41] In a similar vein, the statutory pleading requirements for recklessness or criminal negligence need not be pled if the State also includes greater mental states in the charging instrument.[42]

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[36] *Hammett v. State*, 578 S.W.2d 699, 708 (Tex. Crim. App. 1979) ("Under the new Penal Code, an indictment charging one offense during the commission of another crime need not allege the elements of the latter offense.").

[37] *Barnes v. State*, 876 S.W.2d 316, 323 (Tex. Crim. App. 1994) (burglary); *Marquez v. State*, 725 S.W.2d 217, 235-36 (Tex. Crim. App. 1987) (aggravated sexual assault); *Hogue v. State*, 711 S.W.2d 9, 14 (Tex. Crim. App. 1986) (arson); *Hammett*, 578 S.W.2d at 708 (robbery).

[38] *Earl v. State*, 514 S.W.2d 273, 274 (Tex. Crim. App. 1974) ("Although the proof will involve proving up a theft or attempted theft, the elements of the particular theft . . . or attempted theft . . . need not be alleged in the [robbery] indictment."). *See also Linville v. State*, 620 S.W.2d 130, 131 (Tex. Crim. App. 1981) ("Since theft is only the underlying offense for the robbery, the elements and facts surrounding the theft need not be alleged in the indictment.").

[39] *Gonzales v. State*, 517 S.W.2d 785, 788 (Tex. Crim. App. 1975) ("[T]he constituent elements of the particular theft or intended theft need not be alleged in an indictment or information for burglary with intent to commit theft.").

[40] *Tata v. State*, 446 S.W.3d 456, 463 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd); *Flores v. State*, 102 S.W.3d 328, 331 (Tex. App.—Eastland 2003, pet. ref'd); *Yandell v. State*, 46 S.W.3d 357, 362 (Tex. App.—Austin 2001, pet. ref'd).

[41] *Jarnigan v. State*, 57 S.W.3d 76, 92 (Tex. App.—Houston [14th Dist.] 2001, pet. ref'd); *State v. Rivera*, 42 S.W.3d 323, 329 (Tex. App.—El Paso 2001, pet. ref'd); *Lucario v. State*, 658 S.W.2d 835, 837 (Tex. App.—Houston [1st Dist.] 1983, no pet.).

[42] *Crawford v. State*, 646 S.W.2d 936, 937 (Tex. Crim. App. 1983). *See* TEX. CODE CRIM. (continued...)

This all appears to be a function of common sense. Regardless of whether the indictment includes the elements of the predicate offense, the State has to prove them.[43] That being the case, the conclusion that the offenses are included within the charged offense is unavoidable. This court put it simply in *Littrell v. State*: a felony murder indictment alleging "the appellant committed an act clearly dangerous to human life that caused the complainant's death during the commission (or attempted commission) of aggravated robbery" requires the State to "prove no more than the aggravated robbery (or attempted aggravated robbery) . . . plus additional facts."[44] The Court reached the same result with capital murder: an indictment that alleges intentionally causing death while in the course of committing or attempt to commit burglary of a habitation requires the State to "prove no more than the burglary (or attempted burglary) plus additional facts."[45] In other words, any defendant charged with one of these offenses knows the lesser is there and can look up the elements. To hold otherwise would turn the concept of a "predicate offense" on its head.

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[42](...continued)
PROC. art. 21.15.

[43] *Langs v. State*, 183 S.W.3d 680, 686 (Tex. Crim. App. 2006) (the State must prove the elements of the felony underlying a burglary charge under Section 30.02(a)(3)).

[44] 271 S.W.3d 273, 276-77 (Tex. Crim. App. 2008). *See also Fraser*, 583 S.W.3d at 568 (noting in passing that "the predicate felonies (injury to a child and endangering a child) . . . are themselves lesser-included offenses of [felony murder as charged]").

[45] *Ex parte Castillo*, 469 S.W.3d at 170 (cleaned up).

There is no reason to treat this offense differently. By its plain language, ORT subsumes the offense of theft every time it is alleged. In fact, that was part of the problem this Court had with charging appellant with it. This Court concluded her theft did not establish ORT because "the statute requires proof of some activity undertaken with respect to stolen retail merchandise that goes beyond the conduct inherent in ordinary shoplifting."[46] In other words, theft is present but not enough; "additional facts" are required to justify an ORT conviction.

I.D. Contrary cases should be disavowed.

There are many opinions, including from this Court, that treat theft differently with regard to lessers despite the case law cited above. This line of thinking appears to begin with this Court's opinion in *Ex parte Sewell*, which held that a burglary indictment that did not allege the property stolen or its value could not support a lesser-included conviction for theft.[47] But the only cases cited in support of this holding have nothing to do with the sufficiency of the factual allegations. Rather, they were both decided on the idea, true then and now, that an accusation of burglary with the intent to commit theft will not support a lesser of completed theft.[48]

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[46] *Lang II*, 561 S.W.3d at 183.

[47] 606 S.W.2d 924, 924 (Tex. Crim. App. 1980).

[48] *See Hardin v. State*, 458 S.W.2d 822, 824 (Tex. Crim. App. 1970) ("It is thus clear that the offense of burglary may be complete whether any theft ever occurs or not."); *Franks v. State*, 516 (continued...)

Regardless of this lack of explanation, at least one court of appeals justified *Sewell*'s holding on the basis that "[a]n indictment for theft that does not adequately describe the property or adequately allege its value would be defective and susceptible to a motion to quash."[49] That's true, but misses the point. As shown above, this Court has consistently 1) treated subsumed lessers as lessers despite the absence of *any* elements being pled, let alone statutory pleading requirements, and 2) refused to permit motions to quash to force their pleading. There is no way to square this rationalization of *Sewell* with this Court's jurisprudence.

A different panel of the court of appeals in this case cited *Sewell* when making a more interesting "element" argument in *DeLeon v. State*.[50] In that case, the court of appeals held that theft of a firearm is not included in a burglary with, *inter alia*, the commission of theft because the fact that the stolen item was a firearm raised the offense level.[51] It cited numerous cases that correctly point out that the value or identity of the item is necessary to set the offense level in a theft prosecution and is

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[48](...continued)
S.W.2d 185, 187 (Tex. Crim. App. 1974) (analogizing a revocation ground to an indictment and citing *Hardin*).

[49] *Dixon v. State*, 43 S.W.3d 548, 551 (Tex. App.—Texarkana 2001, no pet.) (upholding the denial of Dixon's request for a lesser for theft on that basis).

[50] 583 S.W.3d 693 (Tex. App.—Austin 2018, pet. ref'd).

[51] *Id*. at 697.

sometimes jurisdictional so should be pled and must be found by a jury.[52] It concluded:

> Because the value or nature of the stolen property is an essential element of the offense of theft, an indictment that does not allege the value or nature of the stolen property is substantively defective as to a charge of theft, even if the indictment is not defective as to a greater offense, such as burglary.[53]

Again, that court of appeals did not attempt to square this thinking with the many cases from this Court that say the opposite about subsumed lessers. A notice complaint that might be valid if made in a theft case does not require the same result when made in a burglary case. It certainly does not mean that the offense of burglary with the commission of theft does not include a theft. If anything, the bare allegation of the commission of a theft as part of a burglary necessarily includes every theft that could be charged under Section 31.03. Despite the obstacle to *reformation* in a case in which the jury was never asked to decide a fact that determines the offense level of a legally subsumed theft,[54] that theft offense is legally included in the charged offense under *Hall* unless the factual averments say otherwise.

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[52] *Id*. at 697-98.

[53] *Id*. at 698 (citing *Sewell*).

[54] The offense level is set by the value or item stolen. *See* TEX. PENAL CODE § 31.03(e)(4)(c) (theft of firearm is a state jail felony). Although some theft-predicated offenses, like burglary, might be tried without presenting evidence on value, that is not a problem in this case; the ORT conviction required a finding on a value range that directly corresponds with a theft offense level in effect at the time. 1 CR 37 (charge), 41 (judgment).

As the court of appeals in *DeLeon* detailed, there are many opinions from many courts that make the same or similar mistakes.[55] They all confuse pleading requirements that are forfeitable in a theft prosecution for elements that are essential to Step 1 of *Hall*. They should be explicitly rejected.

II. Rejecting theft as a subsumed lesser of ORT produces many, potentially serious undesirable consequences.

Reversing the court of appeals in this case is correct for all the reasons explained above. But it is also correct because upholding it will lead to much mischief in related areas of law.

If the State's failure to allege the owner's name prevents reformation to theft on appeal, it must also prevent both parties from obtaining a jury instruction on theft as a lesser. That would be the end of it had this Court not shown in *State v. Meru* the intent to empower defendants to use a motion to quash to expand the State's allegations solely for the purpose of obtaining a "lesser" instruction at trial.[56] As this is the predictable next step after limiting the availability of lessers in the absence of more specific pleadings, its effect on our fundamental understanding of things like the State's prosecution authority and accepted pleading rules should be considered.

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[55] *DeLeon*, 583 S.W.3d at 698-700.

[56] 414 S.W.3d at 164 n.3.

II.A. What a difference two years makes.

In 2011, a unanimous Court held in *Rice v. State* that a defendant charged with aggravated assault with a deadly weapon, to-wit: a motor vehicle, was not entitled to an instruction on reckless driving because "driving" could not be inferred from the indictment.[57] The Court gave no indication that this was an unfair result in need of a fix.

Two years later, in *State v. Meru*, this Court held that an indictment for burglary of a habitation that tracks the language of the statute does not include criminal trespass because the "burglary" definition of "enter" is more narrow than the "trespass" definition of "entry."[58] Judge Alcalá, joined by two judges, disagreed with this conclusion because it meant that, "absent unrealistic manipulation of pleadings by the State, criminal trespass, as a matter of law, will never be a lesser-included offense of burglary."[59] Judge Price agreed with the majority's resolution as consistent with *Hall* and progeny but suggested that a defendant in Meru's position "may seek greater specificity via a motion to quash for lack of critical notice, asking for

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[57] 333 S.W.3d 140, 145-48 (Tex. Crim. App. 2011). The video of the incident showing Rice driving the car was admitted, *id*. at 142, and presumably available before trial.

[58] 414 S.W.3d at 163-64. *Compare* TEX. PENAL CODE § 30.02(b) ("For purposes of [burglary], 'enter' means to intrude: (1) any part of the body; or (2) any physical object connected with the body."), *with* TEX. PENAL CODE § 30.05(b)(1) ("'Entry' means the intrusion of the entire body.").

[59] *Id*. at 165 (Alcalá, J., concurring).

clarification whether the State intends to prove that element by virtue of evidence that he intruded upon the premises with his whole body or no more than a part."[60] Perhaps in response, the majority intimated in a footnote that

> a defendant who committed a full-body entry and wants the opportunity for an instruction on criminal trespass can file a motion to quash the indictment for lack of particularity. This would force the State to re-file the indictment, specifying the type of entry it alleges the defendant committed and allow either party to later request an instruction on criminal trespass.[61]

In other words, a defendant could compel "unrealistic manipulation of pleadings by the State." This suggestion has finally caught on, and a petition on a case applying it is currently pending before this Court.[62]

II.B. Charging offenses is the State's prerogative.

The first area of law affected by *Meru* would be on charging offenses, but the effects would be felt at trial and on appeal.

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[60] *Id*. at 171 n.15 (Price, J., concurring).

[61] *Id*. at 164 n.3.

[62] *See State v. Ingram*, PD-0159-20 (filed 3/24/20); *State v. Ingram*, No. 12-18-00329-CR, 2020 WL 90915, at *5 (Tex. App.—Tyler Jan. 8, 2020, pet. filed) (op. on reh'g) (not designated for publication) (upholding the trial court's order quashing the burglary indictment because "footnote 3 in *Meru* unequivocally states that a burglary indictment can be quashed for lack of particularity when the indictment does not specify whether the State alleges the defendant made a full or partial body entry into the subject building or habitation.").

II.B.1. The State's discretion to choose what to charge is clear.

"Both Texas and federal courts recognize that prosecutors have broad discretion in deciding which cases to prosecute."[63] Relevant here, this discretion applies not only to the decision to prosecute but also which offense to prosecute. The Supreme Court "has long recognized that when an act violates more than one criminal statute, the Government may prosecutes (sic) under either so long as it does not discriminate against any class of defendants."[64]

There are multiple reasons to leave these decisions to prosecutors. The first is that prosecutors are suited for it. "The decision to prosecute a criminal case . . . is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice."[65] The second is that judges are not. The State's discretion

> rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's

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[63] *Neal v. State*, 150 S.W.3d 169, 173 (Tex. Crim. App. 2004). *See also United States v. Batchelder*, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.").

[64] *Batchelder*, 442 U.S. at 123-24. This is subject to *pari materia*. *Burke v. State*, 28 S.W.3d 545, 549 (Tex. Crim. App. 2000).

[65] *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 386 (2004).

> overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.[66]

Not surprisingly, there are no cases examining the pros and cons of leaving charging decisions to the accused. That is because she has no rights, either constitutional[67] or statutory.[68] In fact, the only power expressly granted defendants regarding charging is the limited ability to waive indictment.[69] The fact that much of this process can be waived or side-stepped in the absence of request or objection[70] does not change the fact that a defendant has no legitimate role in shaping the charge against her.

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[66] *Wayte v. United States*, 470 U.S. 598, 607 (1985).

[67] *Moczygemba v. State*, 532 S.W.2d 636, 638 (Tex. Crim. App. 1976) ("An accused or one being investigated by a grand jury does not have the constitutional right to appear in person or by counsel before the grand jury[,]" or "to be confronted with and to cross-examine witnesses who appear before a grand jury investigating and considering matters in which the accused is a prospective defendant.").

[68] *See* TEX. CODE CRIM. PROC. arts. 21.01 ("An 'indictment' is the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense."), 21.20 ("An 'information' is a written statement filed and presented in behalf of the State by the district or county attorney, charging the defendant with an offense which may by law be so prosecuted."). Her presence is not even permitted unless requested by the grand jury or State. *Id*. arts. 20.011 ("Who may be present in grand jury room"), 20.10 ("Attorney or foreman may issue process"), 20.17 ("How suspect or accused questioned").

[69] TEX. CODE CRIM. PROC. art. 1.141.

[70] TEX. CODE CRIM. PROC. art. 28.10(a) (10-days notice "[o]n request of the defendant . . ."), (b) (amendment after trial begins "if the defendant does not object"), (c) (no additional or different charges "over the defendant's objection"). *See generally id*. art. 1.14(a) ("The defendant in a criminal prosecution for any offense may waive any rights secured him by law except that a defendant in a capital felony case may waive the right of trial by jury only in the manner permitted by Article 1.13(b) of this code."). Article 1.14(b) limits the right to complain about defects and errors but does not limit a defendants rights under Article 28.10. Regardless, even a defendant's strategic choices regarding amendments are subject to the trial court's approval. *Id*. art. 28.11.

That is what is so troubling about *Meru*'s *dicta*. Endorsing it would permit a defendant to reach into the State's charging instrument, not for clarification on the charged offense, but to force the allegation of factual averments to make something that is not a lesser-included offense according to *Hall* available at the charge conference. Put succinctly, *Meru*'s *dicta* would let a defendant make the State charge an offense the State does not want to charge. That should not be possible. Ironically, it would take one of the rationales that drove *Hall*—protecting defendants from convictions for unpled offenses[71]—and turn it into a weapon defendants can wield against the State. This reason alone should make the Court cautious about unnecessarily limiting the availability of lessers and, as a result, artificially creating the need for *Meru*'s proposed remedy.

II.B.2. This discretion undergirds numerous areas of law that would be threatened.

The recognition that the State controls charging decisions extends into and beyond trial. It is unclear how these areas of law will be affected by granting defendants some control over the charging process.

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[71] *Hall*, 225 S.W.3d at 532, 537.

For example, this Court has repeatedly cautioned courts against allowing defendants to make the case about an offense other than what the State charged.[72] A defendant has every right to contest the events underlying the charge in order to obtain a defensive instruction or instruction on a lesser-included offense,[73] but it has to be an offense that was included in what the State charged. *Meru* suggests the defendant can change that at the front end.

Similarly, the State's ability to obtain a lesser-include offense without satisfying the second prong of *Hall* is premised on its authority to pursue the charged offense: "It is the State, not the defendant, that chooses what offense is to be charged."[74] What happens when the defendant is given the authority to add other offenses through a motion to quash? Does that qualify the State's preferential treatment under *Hall*, or does it simply allow the defense to request lessers of its "*Meru*" lesser without any "guilty only" evidence? It's impossible to say with certainty.

Most importantly, how are compelled allegations to be treated for sufficiency purposes? The State is sometimes bound to prove factual allegations and always

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[72] *Bufkin v. State*, 207 S.W.3d 779, 781 (Tex. Crim. App. 2006) ("It is certainly true that the defendant cannot foist upon the State a crime the State did not intend to prosecute in order to gain an instruction on a defensive issue or a lesser included offense.").

[73] *Id*. at 781-82, 783.

[74] *Grey v. State*, 298 S.W.3d 644, 649-50 (Tex. Crim. App. 2009).

bound to prove its chosen statutory options because it assumed the burden.[75] What happens when the choice is made for it? This is especially tricky if the *Meru* remedy is justified on anything akin to "critical notice," as Judge Price suggested. Any allegation that is required because it is critical to preparing a defense must give rise to a "material" variance, right?[76] The only way to avoid unprincipled, disparate treatment would be to acknowledge what *Meru* suggested: a motion to quash can be used solely to engineer an accusation the State chose not to make.

II.C. Forcing the State to allege facts solely to authorize lessers is unheard of and contrary to established pleading law and pretrial practice.

Beyond the threat to the law governing charging decisions and its underlying policy, *Meru*'s suggestion violates basic technical pleading rules and invites the sort of speculation over evidence rejected in pretrial practice.

II.C.1. Compelled elaboration serves no purpose required by law.

The Code of Criminal Procedure sets out the relevant requisites of a charging instrument.[77] The primary purpose of these rules is to ensure "[t]he charging

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[75] *Johnson*, 364 S.W.3d at 298-99.

[76] *See Gollihar v. State*, 46 S.W.3d 243, 257 (Tex. Crim. App. 2001) (adopting a materiality standard based in part on providing sufficient notice to prepare for trial).

[77] TEX. CODE CRIM. PROC. arts. 21.02(7) ("The offense must be set forth in plain and intelligible words."), 21.03 ("Everything should be stated in an indictment which is necessary to be proved."), 21.04 ("The certainty required in an indictment is such as will enable the accused to plead the judgment that may be given upon it in bar of any prosecution for the same offense."), 21.11 ("An (continued...)

instrument . . . convey[s] sufficient notice to allow the accused to prepare his defense."[78] That includes "begin[ning] to think productively about the kind of evidence he might want to marshal, as well as how he might best convince a jury [of his innocence]."[79] Crucially, this "defense" is a defense against the charged offense. When Article 21.03 says the instrument must allege everything "necessary to be proved," it means "everything necessary to be proven to sustain a conviction in the guilt/innocence phase of a trial."[80] That does not include factual averments necessary only to authorize a conviction on a distinct offense that might be supported by the evidence at trial.

Moreover, lesser-included offenses are by definition not defenses. Defenses to Penal Code offenses (and non-code offenses unless stated) are "so labeled by the

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[77](...continued)
indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and with that degree of certainty that will give the defendant notice of the particular offense with which he is charged, and enable the court, on conviction, to pronounce the proper judgment[.]").

[78] *State v. Mays*, 967 S.W.2d 404, 406 (Tex. Crim. App. 1998).

[79] *State v. Ross*, 573 S.W.3d 817, 828 (Tex. Crim. App. 2019).

[80] *Brooks v. State*, 957 S.W.2d 30, 32 (Tex. Crim. App. 1997) (quotation and emphasis omitted). *See also Kellar v. State*, 108 S.W.3d 311, 313 (Tex. Crim. App. 2003) ("When a motion to quash is overruled, a defendant suffers no harm unless he did not, in fact, receive notice of the State's theory against which he would have to defend.").

phrase: 'It is a defense to prosecution . . . .'"[81] Lessers are not mentioned in the Penal Code, with that phrasing or otherwise. The concept is a creature of the Code of Criminal Procedure.[82]

It is also intuitively not a good fit. This Court has tacitly recognized a distinction between lessers and defensive issues generally,[83] as have Professors Dix and Schmolesky.[84] This could be because lessers are available to both parties and, as

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[81] TEX. PENAL CODE § 2.03(a). *See* TEX. PENAL CODE § 1.03(b) ("The provisions of Titles 1, 2, and 3 apply to offenses defined by other laws, unless the statute defining the offense provides otherwise . . .").

[82] TEX. CODE CRIM. PROC. arts. 37.08 ("In a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense."), 37.09 (defining when an offense is a lesser).

[83] *See Tolbert v. State*, 306 S.W.3d 776, 780 (Tex. Crim. App. 2010) ("These considerations underscore our case-law stating that lesser-included instructions are like defensive issues and that a trial court is not statutorily required to *sua sponte* instruct the jury on lesser-included offenses because these issues frequently depend upon trial strategy and tactics.") (quotation omitted); *Delgado v. State*, 235 S.W.3d 244, 249 (Tex. Crim. App. 2007) ("But it does not inevitably follow that he has a similar *sua sponte* duty to instruct the jury on all potential defensive issues, lesser-included offenses, or evidentiary issues."); *Bufkin*, 207 S.W.3d at 782 ("[W]e must first keep in mind that we do not apply the usual rule of appellate deference to trial court rulings when reviewing a trial court's decision to deny a requested defensive instruction (whether for the submission of a defense or for a lesser-included offense).").

[84] George E. Dix & John M. Schmolesky, 43 Texas Practice: Criminal Practice and Procedure § 43:30, at 905 (3d ed. 2011) ("Thus, the typical rule of appellate deference to trial court rulings does not apply to a trial court's decision whether to submit or deny a defendant's request for a defense instruction or a lesser included offense."); § 43:49, at 971 ("[A] lesser included offense may be thought of as a partial defense; a reason to find the defendant not guilty of the charged offense[,] albeit guilty of some other, lesser offense. Thus, in deciding whether to give a charge on a lesser offense, as with defense instructions, ...").

stated above, the State may obtain an instruction easier than the defendant can.[85] That is not the hallmark of a defense.

But there is a more fundamental reason that a lesser is not a defense to prosecution: it is not necessary for acquittal. Unlike nearly all statutory defenses, an instruction on a lesser is not required to give effect to the evidence supporting it. Instead, an instruction is what you might request *after* you have a valid, factual defense you can argue to the jury. The fact that an acquittal can be obtained without a "lesser" instruction is the reason it is not inherently deficient performance for defense counsel not to request one.[86]

In no real sense of the word, then, is the desire to obtain a lesser the sort of preparation of a defense contemplated by the Legislature or this Court. It is also unclear what burden, if any, a defendant would face. Is it enough for counsel to represent to the trial court his belief that competent evidence will support the "guilty only" prong of *Hall*? What if the proposed entitlement will be based on the negation of an element the State has to prove? Will the hearing on motion to quash become a mini-trial where the defense persuades the trial court it has a good faith bases to believe the State's case will be insufficient in some way? This Court has said "[t]he

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[85] *Grey*, 298 S.W.3d at 651.

[86] *Tolbert*, 306 S.W.3d at 780-81.

purpose of a pre-trial motion is to address preliminary matters, not the merits of the case itself."[87] Either that will have to change or the State might end up bound by unwanted allegations based solely on the defense's say-so.

II.C.2. Requiring factual averments is inconsistent with this Court's cases.

The ability to force the State to amend its charging instrument solely for "lesser" purposes would also be an outlier given this Court's treatment of nearly every other type of factual (and sometimes statutory) allegation.

This Court rarely requires the State to plead anything other than the statutory text of the offense.[88] The most common exception is with statutory alternatives that "describe, concern, involve, or go to" the defendant's act or omission[89] which must be pled upon request. Rarely, "[a] statute which uses an undefined term of indeterminate or variable meaning requires more specific pleading in order to notify the defendant of the nature of the charges against him."[90] But the vast majority of

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[87] *Woods v. State*, 153 S.W.3d 413, 415 (Tex. Crim. App. 2005) ("We now conclude that the statutes authorizing pre-trial proceedings do not contemplate a 'mini-trial' on the sufficiency of the evidence to support an element of the offense.").

[88] *State v. Barbernell*, 257 S.W.3d 248, 251 (Tex. Crim. App. 2008).

[89] *State v. Jarreau*, 512 S.W.3d 352, 356 (Tex. Crim. App. 2017).

[90] *Mays*, 967 S.W.2d at 407. *See*, *e.g.*, *Olurebi v. State*, 870 S.W.2d 58, 62 (Tex. Crim. App. 1994) (trial court should grant a motion to quash an allegation under TEX. PENAL CODE § 32.31(b)(2), use of a "fictitious credit card," when indictment fails to specify the manner in which the credit card is "fictitious," as that term is not defined and there are two ways for a credit card to be fictitious).

cases in which a defendant demands more factual averments end with his disappointment because it "would improperly place upon the State the burden of pleading facts which are essentially evidentiary in nature."[91] And this Court has repeatedly said "the State need not plead evidentiary matters[,]"[92] which include both additional factual averments that would describe the alleged conduct[93] and unpled statutory definitions.[94]

This practice is reflected in this Court's "subsumed lesser" cases, as noted in part I, but also outside of that context. It was apparently the rule for "with the intent to commit" crimes before the 1974 Penal Code,[95] and it was continued in the 1965 Code of Criminal Procedure.[96] Similarly, allegations of attempt and conspiracy need not include the elements of the underlying offense.[97] The State also has no obligation

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[91] *State v. Edmond*, 933 S.W.2d 120, 130 (Tex. Crim. App. 1996).

[92] *Curry v. State*, 30 S.W.3d 394, 398 (Tex. Crim. App. 2000).

[93] *See*, *e.g.*, *Ross*, 573 S.W.3d at 829 ("[T]hese particulars would ultimately serve as nothing more than an accounting of how the State intends to prove [its case]. That is exactly what is meant by 'evidentiary matters.'").

[94] *Barbernell*, 257 S.W.3d at 251, 256.

[95] *Gonzales*, 517 S.W.2d at 787-88 (collecting cases).

[96] TEX. CODE CRIM. PROC. art. 21.13 ("An indictment for an act done with intent to commit some other offense may charge in general terms the commission of such act with intent to commit such other offense.").

[97] *Inman v. State*, 650 S.W.2d 417, 420 (Tex. Crim. App. 1983) (attempted theft); *Williams v. State*, 544 S.W.2d 428, 430 (Tex. Crim. App. 1976) (attempted burglary); *Farrington v. State*, 489 (continued...)

to plead the law of parties,[98] even when the State knows it has no intent to prove the defendant personally performed the required conduct.[99]

If the State does not have to plead any of this information when it would otherwise be applicable to the offense charged, it is unclear how it can be forced to allege facts that are only relevant to a separate, not-yet-lesser offense.

II.D. The only possible justification is the presumption of juror misconduct.

Outside of *Meru*'s *ipse dixit* that a motion to quash is available for the forced expansion of pleadings to accommodate a lesser, the only argument supported by this Court's cases is the claim that the inability to pursue a lesser at trial will impair the defense or lead to juror misconduct. The argument might look like this:

> Your Honor, my client wants to exercise her right to testify that this was just a theft. Because you have denied our motion to quash, however, I have advised her not to testify because her admission will not do us any good; in the absence of an alternative, we feel the jury will convict her for doing something criminal rather than let her go.

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[97](...continued)
S.W.2d 607, 609 (Tex. Crim. App. 1972) ("An indictment charging a conspiracy to commit a felony need not allege the offense intended with the particularity necessary in an indictment charging the commission of the intended offense."), *accord Delay v. State*, 465 S.W.3d 232, 240 n.21 (Tex. Crim. App. 2014) (acknowledging this is still the practice under the new code).

[98] *Marable v. State*, 85 S.W.3d 287 (Tex. Crim. App. 2002).

[99] *See* TEX. PENAL CODE § 7.01(c) ("All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.").

This might sound silly but for this Court's repeated endorsement of the rule that "the harm from denying a lesser offense instruction stems from the potential to place the jury in the dilemma of convicting for a greater offense in which the jury has reasonable doubt or releasing entirely from criminal liability a person the jury is convinced is a wrongdoer."[100] The procedural postures are different—one is an argument for entitlement and the other a harm analysis after entitlement was established—but presumed juror misconduct is presumed juror misconduct. It is difficult to see how the *Saunders* rule, born of death penalty law,[101] has no role to play in the *Meru* argument. Who could blame a trial court for following *Meru* in light of a hypothetical threat of unjust conviction repeatedly sanctioned by this Court? Thus, when the time comes, the *Saunders* rule should be abandoned as antithetical to the normal presumption of proper juror conduct.

III. Conclusion

An indictment for ORT always includes an accusation of theft. No amount of potential objections to a hypothetical theft allegation could change that legal truth. When, as in this case, the jury's verdict necessarily includes findings on every

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[100] *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005) (citing *Saunders v. State*, 913 S.W.2d 564, 572 (Tex. Crim. App. 1995)).

[101] *Grey*, 298 S.W.3d at 648 (explaining its origins in capital cases like *Beck v. Alabama*, 447 U.S. 625 (1980)); *Saunders*, 913 S.W.2d at 571 n.3 ("[A]bsent the reasoning that underlies *Beck*, there could be no inference of harm at all in the failure of the trial court to give a lesser included offense instruction.").

element necessary for a theft conviction, a defendant should stand convicted of it. Any other result would cause far more damage than it could possibly prevent.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and reform appellant's conviction to theft.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th day of April, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

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